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NO. 90-1944

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FRED KRUGER, et al.,

Petitioners,

v.

EASTERN AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should even entertain this petition given that: (a) the court below dismissed petitioners' appeal as moot; (b) most of the issues raised by petitioners have not been adjudicated below; and (c) this Court has previously rejected consideration of two identical issues in petitioners' prior petition for a writ of certiorari based on an order of the United States Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	8
CONCLUSION	11

TABLE OF AUTHORITIES

PAGE

CASES

In re Ionosphere Clubs, Inc., 113 Bankr. 164 (Bankr. S.D.N.Y. 1990) 2

Tristani v. Eastern Air Lines, Inc., _____ U.S. ___, 111 S. Ct. 970 (1991) 5

STATUTES

11 U.S.C. § 362 3

28 U.S.C. § 157(a) 6, 9

28 U.S.C. § 1404(a) 5

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STATEMENT OF THE CASE

Respondent Eastern Air Lines, Inc. ("Eastern")[1] respectfully requests this

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1. Pursuant to Rule 29.1 of the Rules of this Court, Eastern hereby states that its nominal parent company is Continental Airlines Holdings, Inc. ("CAH"). On April 19, 1990, a chapter 11 Bankruptcy Trustee, Martin R. Shugrue, Jr., was appointed by the United States Bankruptcy Court for the Southern District of New York to manage and

(continued...)

Court to deny the Petition for a Writ of Certiorari seeking review of the Mandate of the United States Court of Appeals for the Second Circuit entered on May 7, 1991, which dismissed petitioners' appeal as moot.

The petition arises from an adversary proceeding filed by respondent Eastern Air Lines ("Eastern") in its chapter 11 bankruptcy case in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The adversary proceeding was filed in response to petitioners' suit against Eastern in the United States District Court for the Northern District

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1. (...continued)
control Eastern, replacing CAH (then known as Texas Air Corporation) and its management. See In re Ionosphere Clubs, Inc., 113 Bankr. 164 (Bankr. S.D.N.Y. 1990). Eastern's only non-wholly owned subsidiary is Bar Harbor Airways, Inc. ("BHA"). Eastern owns 99.5% of BHA's outstanding stock.

of Georgia in February 1990 (the "Georgia lawsuit"). The Georgia lawsuit was filed considerably after the filing of the chapter 11 bankruptcy petition of respondent Eastern in the Bankruptcy Court, and was commenced without any request to the Bankruptcy Court to lift the automatic stay in bankruptcy to allow the suit to proceed. As discussed further below, the Georgia lawsuit is not the subject of the petition. Instead, the petition involves only the Bankruptcy Court adversary proceeding, which Eastern commenced in order to obtain an injunction against prosecution of the Georgia lawsuit.

In the adversary proceeding, Eastern sought to enjoin the Georgia lawsuit as a violation of the automatic stay imposed by the Bankruptcy Code (11 U.S.C. § 362). The Bankruptcy Court issued an injunction that barred the prosecution of the Georgia lawsuit on the grounds, inter

alia, that the lawsuit had been brought in violation of the automatic stay. That injunction was affirmed in an Opinion and Order of the United States District Court for the Southern District of New York, dated February 14, 1991.

The injunction issued by the Bankruptcy Court, and affirmed by the District Court, restrained petitioners from prosecuting the claims raised in the Georgia lawsuit in any case other than the bankruptcy case of Eastern. As discussed below, an appeal from the District Court's order was taken to the United States Court of Appeals for the Second Circuit, but that appeal was dismissed as moot.

The Second Circuit's determination of mootness stems from events involving the Georgia lawsuit. Notwithstanding the Bankruptcy Court's order enjoining prosecution of the Georgia lawsuit, the peti-

tioners continued prosecution of that action until it was dismissed by the United States District Court for the Northern District of Georgia. An appeal from that dismissal was taken to the United States Court of Appeals for the Eleventh Circuit, which vacated the dismissal and ordered the transfer of the Georgia lawsuit to the Southern District of New York (where Eastern's bankruptcy case is pending) pursuant to 28 U.S.C. § 1404(a). The transfer occurred on November 30, 1990.

Petitioners then filed a petition for a writ of certiorari, No. 90-1051, based on the transfer order of the United States Court of Appeals for the Eleventh Circuit. The petition was denied by this Court in an order dated February 19, 1991. Tristani v. Eastern Air Lines, Inc., ____ U.S. _____, 111 S. Ct. 970 (1991).

After the United States District Court for the Southern District of New York had affirmed the Bankruptcy Court's injunction, it issued an Opinion and Order dated February 27, 1991 directing that the separate Georgia lawsuit -- which had been transferred to New York pursuant to the Eleventh Circuit's order -- be referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(a) and the District Court's "Standing Order of Referral of Cases to Bankruptcy Judges." The Georgia lawsuit is now an adversary proceeding in the Eastern bankruptcy case and is pending in the Bankruptcy Court. Because the Bankruptcy Court's injunction did not bar prosecution in the Bankruptcy Court of the claims in the Georgia lawsuit, and the Georgia lawsuit was independently transferred to the Bankruptcy Court, the Bankruptcy Court's

injunction no longer bars prosecution of that lawsuit.

Notwithstanding the fact that prosecution of the Georgia lawsuit is no longer barred, petitioners appealed the District Court's affirmance of the Bankruptcy Court's injunction to the United States Court of Appeals for the Second Circuit. Respondent Eastern moved to dismiss the appeal as moot in light of the transfer of the Georgia lawsuit to the Bankruptcy Court, which had the effect of removing the injunction against prosecution of that lawsuit. While the injunction had also provided the basis for certain damages claims against petitioners, those claims were settled in return for payments of $100,000 by petitioner Rolleston. Therefore, the injunction order that petitioners sought to appeal was moot.

The United States Court of Appeals for the Second Circuit dismissed petitioners' appeal as moot on May 7, 1991. (The Second Circuit's order is reproduced as page A-1 of the petition).

REASONS FOR DENYING THE PETITION

Petitioners filed their present petition for a writ of certiorari on June 20, 1991. Petitioners have failed to suggest any basis upon which this Court should conclude that their appeal is not moot.

In addition, the first two questions presented for this Court's review are identical to questions presented in petitioners' previous petition, in which they sought a writ of certiorari to review the transfer order of the United States Court of Appeals for the Eleventh Circuit. These are the issues of whether the alleged post-petition status of the claims in the Georgia lawsuit requires a

core bankruptcy designation pursuant to 28 U.S.C. § 157, and whether a bankruptcy court can conduct a jury trial. This Court rejected consideration of these issues by denying petitioners' previous petition for a writ of certiorari.

The first two questions, as well as the third question presented in the petition, involve litigation of the substantive claims raised in the Georgia lawsuit, but have no relevance to the injunction ordered in the separate adversary proceeding that is now before this Court. The courts below decided that the Georgia lawsuit violated the automatic stay without considering any of the first three questions raised in the petition. Thus, the first three questions presented are not properly before this Court.

By asserting that they are entitled to a trial in Atlanta, Georgia, see

petition at 11, petitioners also appear to be seeking to transfer the Georgia lawsuit back to the District Court in Georgia. However, the transfer issue was not before the Second Circuit, nor is it properly before this Court, because this appeal involves the adversary proceeding commenced by respondent Eastern in the Bankruptcy Court, rather than the Georgia lawsuit.

The fourth question raised in the petition involves a due process issue that was fully considered in the opinion of the District Court (pages 20-27), which rejected petitioners' contentions. (The opinion of the District Court is annexed to the petition beginning at page A - 2.) The petition makes no effort to dispute the ruling of the District Court, and actually contains no legal argument on any issue other than the jury trial issue.

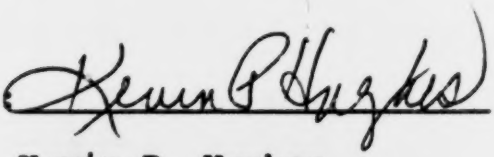
CONCLUSION

Because the court below dismissed petitioners' appeal as moot, because most of the issues raised by petitioners have not been adjudicated below, and because this Court has previously rejected consideration of two identical issues, certiorari should not be granted in this case.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WEIL, GOTSHAL & MANGES

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the foregoing Respondent's Brief In Opposition upon

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by depositing the requisite number of copies of the same in a properly addressed first-class postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York on July 19, 1991.

Kevin P. Hughes